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March 10, 1994

VIA TELECOPY AND FEDERAL EXPRESS

CONFIRMATION OF FAX

Thomas P. Mintz, Esq.  
United States Environmental  
Protection Agency, Region IX  
Office of Regional Counsel  
75 Hawthorne Street  
San Francisco, CA 94105-3901

Re: Administrative Order No. 94-10  
San Fernando Valley Superfund Site, Area 1  
Burbank Operable Unit

Dear Mr. Mintz:

I am writing on behalf of Pacific Airmotive Corporation ("PAC") to follow up on our March 9, 1994 conference with you and David Seter regarding Administrative Order No. 94-10. We certainly appreciated the opportunity to meet with you, and hope that we have established the basis for a cooperative relationship in the future.

As you know, Section XXI.C. of Administrative Order No. 94-10 provides that PAC is to submit a written statement of the arguments and comments we raised on behalf of PAC at the March 9, 1994 conference. Although the Order is not yet effective, I thought it might be useful, in light of your internal deliberations, to have a copy of our written comments. Thus, I have enclosed herewith a three-page outline entitled "CERCLA Section 106 Order Issued to Pacific Airmotive Corporation -- Specific Objections," as well as a supporting legal memorandum entitled "CERCLA Section 106 Order Issued to Pacific Airmotive Corporation -- Statement of Position."

Again, we appreciated the opportunity to meet yesterday with you and Mr. Seter, and will be available today at your convenience to discuss any unresolved issues.

Very truly yours,

*Jerome C. Muys, Jr.*  
Jerome C. Muys, Jr.

Enclosures

CERCLA SECTION 106 ORDER  
ISSUED TO PACIFIC AIRMOTIVE CORPORATION

SPECIFIC OBJECTIONS

1. PAC objects to paragraph II.C. insofar as it defines the Site to include the PAC facility at 3003 North Hollywood Way. The only evidence of a release at this facility is a jet fuel spill which is within the "petroleum exclusion" to CERCLA liability (CERCLA § 101(14)) and therefore outside EPA's jurisdiction.
2. PAC objects to paragraph IV.C. insofar as it refers to storage of jet fuel since jet fuel is within the petroleum exclusion to CERCLA liability.
3. PAC objects to paragraph IV.D. in that it refers to spills of jet fuel from the PAC facilities since such spills are within the CERCLA petroleum exclusion. PAC further objects to this paragraph in that it does not state that the jet fuel spill at PAC's jet engine test facility at 3003 N. Hollywood Way was completely remediated to the satisfaction of the Regional Board.
4. PAC objects to paragraph IV.E. in that it refers to "visible discharges" noted by Regional Board inspectors on December 29, 1987 but does not allege that these alleged discharges were of hazardous substances.
5. PAC objects to paragraph IV.F. insofar as it relies on the existence of toluene at the PAC facility, since the toluene is stated to be "believed to be a component of jet fuel used at the site" and therefore under the petroleum exclusion to CERCLA liability.
6. PAC objects to paragraph IV.G. in that it also relies on toluene found in soils at the PAC facility, which are within the petroleum exclusion.
7. PAC objects to paragraph IV.H. in that it fails to allege that materials that may have been found in the area of the boiler blow-down drainage sump are hazardous substances.
8. PAC objects to paragraph IV.I. in that it fails to allege that the materials that may have been released from the industrial waste clarifier are hazardous substances.
9. PAC objects to the statement in paragraph IV.K. that there is a "likelihood" that releases of solvents have occurred at specified areas.
10. PAC objects to paragraph IV.K. insofar as it relies on the detection of jet fuel in groundwater monitoring samples.
11. PAC objects to paragraph IV.P. in that it implies that PAC has been unwilling to cooperate with the Regional Board. Although PAC objected, and continues to

object, to the scope of the soil vapor survey requested by the Board, it has remained willing to conduct a soil vapor investigation tailored to the potential risks presented by the PAC facility.

12. PAC objects to paragraph IV.T. The May 2, 1989 notice letter notified PAC that "EPA has information indicating that [PAC] may be a PRP" for the Burbank Operable Unit, not that it is a PRP. PAC was not included in the group of PRPs subject to EPA's Order No. 92-12 and has at no other time been found to be a PRP for the Site.
13. PAC objects to section V. None of the conclusions of law are applicable to 3003 N. Hollywood Way.
14. PAC objects to paragraph VI.A. EPA has provided no factual basis for a determination that the PAC Site may present an imminent and substantial endangerment to the public health or welfare or the environment.
15. PAC objects to paragraph VI.B. EPA has provided no factual basis for its assertion that the actions required by the Order are necessary to protect public health, welfare and the environment.
16. PAC objects to paragraph VIII.B.2. insofar as it requires investigative actions at the facility at 3003 North Hollywood Way. The only evidence of a release at this facility cited by EPA is a spill of jet fuel, which is within the petroleum exclusion to CERCLA liability.
17. PAC objects to paragraph VIII.B.2.b.(1) insofar as it requires groundwater sampling at well MW-3 which is located at the 3003 North Hollywood Way facility, for the reasons stated above.
18. PAC objects to paragraph VIII.B.2.b.(2) insofar as it requires testing of groundwater for the presence of jet fuel, since jet fuel releases are outside EPA's CERCLA jurisdiction.
19. PAC objects to the requirement in paragraph VIII.B.2.b.(3) to test for nitrogen and general minerals.
20. PAC objects to paragraph VIII.B.2.c.(1) insofar as it requires a soil gas investigation at the facility at 3003 North Hollywood Way since the only evidence of a release at this facility is a spill of jet fuel which is within the petroleum exclusion to CERCLA liability.
21. PAC objects to paragraph VIII.B.2.c.(3) because there is no basis for requiring a soil vapor sampling grid that covers the entire facility. Actions required under a Section 106 order must be tied to an actual or threatened release of a hazardous substance. There is no basis for an allegation that there have been releases or

threatened releases from the entire PAC facility. In addition, PAC objects to this paragraph in that it requires a soil vapor investigation at the 3003 North Hollywood Way facility for the reasons previously stated.

22. PAC objects to the requirement in paragraph XI. to maintain a central depository of records and documents for 10 years. EPA has no authority under Section 106 to require such action as it is not necessary to protect the public health, welfare, or environment.
23. PAC objects to paragraph XI. insofar as it applies to any privileged document.
24. PAC objects to paragraph XVII. insofar as it does not allow for other financial assurance mechanisms such as insurance or surety bonds.
25. PAC objects to paragraph XXIII. insofar as it misstates the basis for penalties under CERCLA section 106(b). This section imposes liability only where a person willfully fails or refuses to comply with a Section 106 order without sufficient cause.

**CERCLA SECTION 106 ORDER  
ISSUED TO  
PACIFIC AIRMOTIVE CORPORATION**

**STATEMENT OF POSITION**

**I. Introduction**

EPA Region 9 has issued a unilateral order under Section 106 of CERCLA requiring Pacific Airmotive Corporation (PAC) to conduct a soil gas investigation and groundwater monitoring (hereinafter referred to as "the Order"). The purpose of this document is to present PAC's arguments as to why the Order is invalid and beyond EPA's statutory authority.

**II. The CERCLA Section 106 Order Exceeds EPA's Authority Because It Disregards the CERCLA Petroleum Exclusion**

**A. EPA Has No Authority to Require Investigation of the Facility at 3003 North Hollywood Way Because EPA's Only Evidence of a Release is a Spill of Jet Fuel Which Is Within the Petroleum Exclusion**

The Order requires PAC to implement a soil gas investigation at its 3003 North Hollywood Way facility. Order at 13. EPA bases its order to conduct a soil gas investigation at this facility solely on evidence that a "jet fuel spill incident" occurred at the facility in 1984. Order at 4. The incident to which EPA refers was an accidental discharge of jet fuel believed to be from a fuel supply line which PAC reported to the RWQCB on October 23, 1984. In response to this release, PAC excavated 980 cubic yards of soil and conducted groundwater monitoring for five years. All traces of jet fuel were removed from the soil and no evidence of jet fuel was ever detected in the groundwater under the facility.<sup>1/</sup> This spill therefore provides no basis to support the Order.

Even if evidence of continuing contamination of the 3003 North Hollywood Way facility existed, EPA has no authority to require PAC to investigate such contamination because the release of jet fuel is within the "petroleum exclusion" to CERCLA liability.

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<sup>1/</sup> Jet fuel was detected near the detection limit during one groundwater sampling event (September 1992), but that detection occurred at 2940 N. Hollywood Way, not 3003 N. Hollywood Way. Moreover, because jet fuel was not detected in any other sampling event, the quality of the September 1992 data is suspect. Even if the September 1992 data reflect true detections of jet fuel, existing data and information in the Regional Board files indicate that the "jet fuel spill incident" at 3003 N. Hollywood Way is not the source of any jet fuel that may have been detected.

CERCLA Section 101(14) excludes from the definition of "hazardous substance" "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . . ." 42 U.S.C. § 9601(14). The jet fuel released at the 3003 North Hollywood Way facility was a petroleum product within this exclusion. See Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989); Southern Pacific Transp. Co. v. California (Caltrans), 790 F. Supp. 983 (C.D. Cal. 1991). There is therefore no evidence of the release of a CERCLA hazardous substance at the 3003 North Hollywood Way facility that would support a Section 106 order.

**B. EPA Has No Authority to Require PAC To Investigate the Presence Jet Fuel in the Subsurface at the 2940 North Hollywood Way Facility**

The Order requires PAC to analyze soil gas samples taken at both facilities for the presence of jet fuel. Order at 12-13. As discussed above, EPA has no authority to order the investigation at the 3003 North Hollywood Way facility. With respect to the 2940 North Hollywood Way facility, EPA has no authority to require PAC to test for the presence of jet fuel because such contamination, if found to exist, would be within the petroleum exclusion to CERCLA liability. Moreover, EPA has no authority to require PAC to test for the presence of toluene at this facility since, as the Order itself states, any such toluene is "believed to be a component of jet fuel used at the Site." (Order at 5.) See Niecko v. Emro Marketing Co., 769 F. Supp. 973, 981 (E.D. Mich. 1991) (petroleum exclusion applies to otherwise hazardous substances inherent in petroleum).

**III. EPA Has Failed to Demonstrate that an Imminent and Substantial Endangerment Exists**

CERCLA Section 106 does not permit the United States to issue a unilateral order without an adequate finding of an "imminent and substantial endangerment to the public health and welfare or the environment because of an actual or threatened release of a hazardous substance." EPA has failed to make this finding. The Order is therefore invalid.

**A. EPA Has Failed to Describe the Risks Presented By the Releases at the PAC Facilities**

In the Order, EPA states, "The Director has determined that an actual or threatened release of hazardous substances from the Pacific Airmotive Corporation Site may present an imminent and substantial endangerment to the public health or welfare or the environment." Order at 10. The Order, however, provides no basis for this determination. The mere allegation of the Director's determination is not an adequate basis for a Section 106 order. United States v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill., 1982).

EPA's own guidance requires it to describe the nature of the imminent and substantial endangerment in its Section 106 orders. See EPA, "Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions" (March 7, 1990) (hereinafter "106 Guidance") at 11 ("The possible imminent and substantial endangerment must be set forth in the order.") (emphasis added). The 106 Guidance further explains that a Section 106 order must:

describe the underlying factual basis for the conclusion that there may be an imminent and substantial endangerment because of a release or threatened release of [hazardous] substances. To support this conclusion, the findings of fact section should contain a brief summary of data from the remedial investigation which shows the extent of contamination at the site and exposure pathways and establishes the predicate for the response action.

106 Guidance at 17. EPA has failed to provide any factual basis for its allegation of an imminent and substantial endangerment. The Order contains no description of any risks presented by the releases into the soils at the PAC facilities. EPA has therefore failed to meet its burden in issuing the Order.

**B. There Is No Factual Basis For a Determination that an Imminent and Substantial Endangerment Exists**

The inadequacy of the Order is not merely one of allegation. EPA in fact has no factual basis in this case that would support a determination that an imminent and substantial endangerment exists that would justify the Order.

EPA has failed to demonstrate, or even to allege, a nexus between soil contamination at the PAC facility and groundwater contamination. Nowhere in the Order does EPA assert that contamination in the PAC facility soils is related to the groundwater contamination that exists in the San Fernando Valley. The Order simply describes evidence that soil contamination exists at the facility and that groundwater contamination exists under the facility, as it does in the entire geographical region. Nowhere in the Order does EPA provide any explanation for how the soil contamination may be related to the groundwater contamination.

EPA's failure to explain, or in fact even to allege, a nexus between the soil contamination and the groundwater contamination is contrary to EPA's own guidance. The 106 Guidance states:

It is important that the link between the release, the possible endangerment, and the response action to abate the possible

endangerment mandated by the order, be clearly presented in the order.

106 Guidance at 7.

It is scientifically and legally indefensible for EPA to base its Order on an assumption that the contaminants found in the shallow soil at the PAC facility have resulted in contamination of the groundwater below the facility. The PAC facility is located in an area of extensive groundwater contamination due to numerous sources, including the Lockheed Corporation facility adjacent to the PAC facility, and the Burbank Airport. There is no basis for a determination that the PAC facility has contributed to this widespread contamination.

In a technical document filed with the RWQCB on July 30, 1993 (a copy of which was provided to EPA), PAC's expert, Dr. Anne Farr, presented the results of modeling which demonstrated that "the presence of VOCs in the shallow soils at the PAC Site does not pose an existing or future threat to groundwater." Farr Technical Supporting Document at 8. This conclusion was based on the fact that neither PCE nor TCE have been detected in the PAC soils at depths below 15 feet, almost 200 feet above the water table. Dr. Farr's analysis of the likely fate and transport of the contaminants in the PAC soils concluded that the contaminants cannot be expected to discharge to groundwater in the future at levels that could reasonably be expected to affect groundwater quality. EPA's apparent assumption that the contaminants in the PAC soils may reach groundwater is particularly troublesome in light of this evidence to the contrary.

Even assuming that there was evidence demonstrating, or even suggesting, that the PAC soil contamination could reach the underlying groundwater, EPA has provided no evidence that such releases present an imminent and substantial endangerment. As EPA is aware, the groundwater in the Burbank Operable Unit is highly contaminated. It is not, and is not expected to be, used for human consumption. EPA has not alleged that risks are presented through any other exposure pathways. Any potential contribution to this extensive contamination problem from the PAC site could be seen as marginally increasing the risks presented by the contaminated aquifer, but in no way could it be considered to present an imminent and substantial endangerment in and of itself.

The fact that the Order seeks the performance of investigative work rather than remediation is itself evidence that there is no factual basis for a Section 106 order. The Order requires the development of data; that data when developed could possibly form the basis for a determination that an imminent and substantial endangerment exists. Without such data, however, no basis for such a determination exists. See EPA's 106 Guidance at A-1 n.61 ("unilateral orders are generally not recommended for ordering conduct of an RI/FS.").

**C. A Section 106 Order Is Inappropriate In This Case Because There is No Endangerment So Imminent As To Preclude the Use of Other Statutory Authority**

Although the term "imminent and substantial endangerment" has been interpreted broadly by the courts, it nevertheless establishes a standard that must be met before a Section 106 order is issued. As Congress explained with respect to the "imminent and substantial endangerment" authority under another statute:

In using the words "imminent and substantial endangerment to the health of persons", the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health. Nor is the emergency authority to be used in cases where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree.

United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1109 (D. Minn. 1982), quoting the House Committee Report to the Safe Drinking Water Act, H. Rep. No. 1185, 93rd Cong. 2d Sess. 35-36, reprinted in 1974 U.S. Code & Cong. Ad. News 6454, 6487-88). In this case, the invocation of the Section 106 authority is unnecessary and unjustified. In accordance with Congress' intent, the extreme remedy of a Section 106 order, with its concomitant denial of pre-deprivation judicial review, should be used only where the risk is so imminent and substantial that public health and welfare or the environment would be subjected to unreasonable risks during the pendency of administrative action under other authorities.

**D. EPA Has Improperly Based Its Order on Out-of-Date Data**

The Order cites only the following supporting evidence: (1) a 1989 PAC response stating that chlorinated solvents had been detected in soils at the facility; (2) a December 29, 1987 RWQCB inspection during which visible discharges at the chemical/waste storage areas were observed; (3) 1988 data showing PCE, TCE and toluene in soil at the chemical/waste storage areas and underground pipeline; (4) 1988 data showing PCE and TCE in soils at the former location of the three underground solvent storage tanks; (5) an August 16, 1988 RWQCB inspection during which moist soils and high organic vapor analyzer readings were observed; and (6) a November 16, 1989 RWQCB inspection during which leaks associated with the clarifier were observed.<sup>2/</sup>

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<sup>2/</sup> The Order also relies on three jet fuel spills that occurred in 1984, 1990 and 1991. As discussed above, these do not provide a basis for a Section 106 Order.

Order at 3-6. EPA relies on no data more recent than 1989 for its assertion that releases from the PAC facilities have created an imminent and substantial endangerment.<sup>3/</sup>

It is unreasonable to suggest that data of which EPA has been aware for five years or more suddenly have become the basis for a determination that an "imminent" endangerment exists. See Fishel v. Westinghouse Electric Corp., 640 F. Supp. 442, 446 (M.D. Pa. 1986) (two-year-old data "too old" to be of probative value in determination of whether an imminent and substantial endangerment exists).

#### **IV. EPA Has Failed to Demonstrate that the Order Is Necessary to Protect Public Health and Welfare and the Environment**

CERCLA Section 106 permits the United States to issue a unilateral order only if such an order is "necessary to protect public health and welfare and the environment." Again, although EPA makes the bare allegation that the actions required by the Order are necessary to protect the public health, welfare and the environment (Order at 10), it has provided no factual basis that would support this assertion. The CERCLA remediation of the Burbank Operable Unit of the San Fernando Valley Superfund Site is underway. Lockheed Corporation and several other potentially responsible parties (PRPs) are actively involved in the implementation of this remediation.

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<sup>3/</sup> EPA cites groundwater data from the sites which showed PCE, TCE and jet fuel as recently as 1992. These data are evidence of the contaminated nature of the Burbank aquifer, and do not support a determination that the PAC facilities have contributed to this contamination.